United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1550

To be argued by
HARRY R. POLLAK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT HENRY SALLEY

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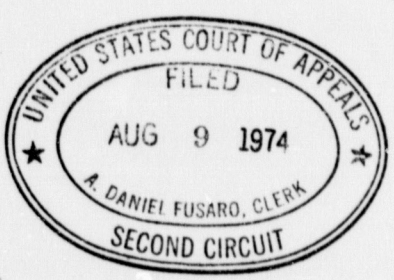

TABLE OF CONTENTS

Brief

TABLE OF CASES

TABLE OF CASES -2-

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court abused its discretion in denying defendant Salley a severance or a continuance following the death of his original appointed counsel and Court appointment of new counsel during the course of the trial.

2. Whether the case against defendant Salley should have been dismissed at the conclusion of the Government's case on the basis of the fact that Salley's connection with the conspiracy constituted at most a "single act."

3. Whether the in Court identification of

defendant Salley by the witness Provitera had been sufficiently tainted by the viewing of suggestive photographs so as to require the suppresion of such identification and the dismissal of the Indictment against defendant Salley since no other witness had identified Salley.

4. All other issues raised in the briefs of the other appellants including, but not limited to, questions of attaint, prejudice in jury selection, and insufficiency of the evidence.

STATEMENT OF FACTS

Henry Salley is charged by the Government in a multi-count Indictment with having joined and participated in a wide spread conspiracy to distribute narcotic drugs. This charge is made under the first count of the Indictment and Salley is not named in any of the other substantive counts of the Indictment. Under the first count in the Indictment, it is further charged, as an overt act, that Salley in October 1972 travelled to the Howard Johnson Motor Lodge in New Jersey in the company of a fellow defendant (Robinson).

Inasmuch as the briefs of the other appellants and the brief of the Government will undoubtedly describe in detail the facts and evidence pertaining to the alleged conspiracy itself (which allegedly had been in progress for several years prior to any claimed participation by Salley), it is unnecessary to repeat the facts at length herein.

It is not claimed, nor was any evidence introduced, that Salley knew or had any contact with any defendants or other conspirators

other than Warren Robinson (a defendant), Harry Pannirello and Jimmy Provitera (both of whom were unindicted co-conspirators who testified for the Government). Only two (2) witnesses (Pannirello and Provitera) testified that Salley was in any way connected with the conspiracy (a third witness, a Government Agent, testified that Pannirello had mentioned Salley's name to him but that he had no first hand knowledge of Salley's part in the conspiracy). The entire evidence against Salley introduced on the Government's direct case is to be found on pages 2208 through 2211 and 3025 through 3030 of the transcript.

The aforementioned sparse testimony was that Pannirello, who testified that he was in charge of what can best be termed as a retail outlet in New Jersey for the distribution of drugs, met Salley on one (1) occasion in the Fall of 1972 (neither he nor Provitera could pinpoint the dates with any exactness) and that, on that occasion, Pannirello and Provitera had spent about forty-five (45) minutes in a restaurant at the Howard Johnson Motor Lodge with Salley and that, immediately

thereafter, Salley was present when, in a room of the motel, Robinson joined them for a discussion about drugs with Pannirello. Pannirello testified that he never saw Salley after that one (1) occasion *(2211)*. Pannirello was unable to identify Salley in the Courtroom *(2209)*.

Provitera's testimony was that he had met Salley on three (3) occasions and that Pannirello had been there on two (2) of those occasions. He identified Salley in the Courtroom *(3026)*. On his first meeting with Salley, Provitera says he was introduced by Robinson to Salley and told that Salley would accept deliveries from him *(3025-26)*. Provitera had earlier in his testimony identified himself and his role as being the pickup and delivery man for Pannirello's drug operation. Provitera testified that he saw Salley a second time when he gave him a package *(3027)*. At his second meeting with Salley, no one else was present although Provitera had testified that Pannirello had been present at the first meeting. Provitera testified that he gave Salley a package at this second meeting and merely told him that Harry would

be in touch with Robinson whom he referred to as "Allen" *(3027)*. Apparently there was no conversation about drugs and no money changed hands. At his third meeting with Salley, Provitera substantially related the same incidents that Pannirello had described about the restaurant and the motel room *(3028-30)*. Again, on this occasion, there was no testimony that Salley discussed drugs or handled drugs or money.

There were four (4) black male defendants on trial in this case and, prior to his identification of Salley, Provitera had identified the defendant Alonzo as being Warren Robinson *(2995-98)*. Accordingly, the trial record reflects that, prior to his in Court identification of Salley, Provitera had learned in the Courtroom the identity of two (2) of the four (4) black male defendants.

Before Provitera had identified Salley and before he had testified, Salley's counsel requested a lineup *(2958-60)*. This application was denied. A Wade Hearing was conducted outside the presence of the jury with respect to a photograph identification of Salley made by the witness Provitera

prior to trial. At this hearing, a Government Agent (Nolan) testified that on one (1) occasion Provitera had been shown a series of nineteen (19) photographs, one of which he identified as being that of Salley. The Agent admitted that the Salley photograph was at least twice as large as the other eighteen (18) photographs *(3087)* and that the other eighteen (18) photographs were mug shots while Salley's was not *(3088)*. Provitera also testified at the Wade Hearing and stated that on three or four occasions he was shown four or five or six photographs thereby somewhat contradicting the testimony of Agent Nolan *(3095-96)*. Although it was conceded by the Government that a photograph of the witness Dawson (with whom Provitera had several meetings) was in the group of nineteen (19) photographs furnished by the Government for the Wade Hearing, Provitera could not identify Dawson's photograph *(3099)*.

At the beginning of the trial, the Court had appointed Murray Segal, Esq. as counsel for the defendant Salley. Mr. Segal died during

the course of the trial and, on February 6, 1974, the Court appointed Harry R. Pollak, Esq. as attorney for defendant Salley. The new attorney made a motion for a severance and, when this was denied, made a motion for a continuance to enable him to familiarize himself with the voluminous transcript up to this date (which was already more than one thousand pages) as well as a very large amount of 3500 material with which he was totally unfamiliar at that time. The motions for severance and for continuance were both denied.

ARGUMENT

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY SALLEY'S MOTION FOR A CONTINUANCE AFTER HIS ORIGINAL ATTORNEY HAD DIED DURING THE TRIAL.

While the Court might have been correctly exercising discretion in denying a motion for a severance in a multi-defendant trial in a situation in which the attorney for one defendant had died during trial, it is respectfully urged that it was an abuse of discretion to refuse a continuance in a situation in which new counsel was thrust into the midst of an ongoing conspiracy trial involving a large number of defendants and giving such new counsel no opportunity whatsoever to acquaint himself with what had gone before. The new counsel was notified on the afternoon of February 6, 1974 while the trial itself was in recess and immediately asked for a severance *(1056)*. At the Court's suggestion, this motion was repeated the following morning and an additional motion for a continuance was made.

While it is true that none of the

testimony that preceded the appointment of new counsel directly touched upon the alleged participation of Salley in the conspiracy, it must be remembered that in a conspiracy case the acts of other co-conspirators are admissable against all defendants.

It is a well-established and much cherished principle of our constitutional law that in all serious criminal prosecutions an accused shall enjoy the right to have the assistance of counsel for his defense. *Johnson v. Zerbst*, 304 U.S. 498, 465-68 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963). In addition to the constitutional guarantee of the 6th Amendment, the right to the aid of counsel is of sufficient fundamental character so as to be included in the 5th Amendment conception of due process of law. *Powell v. Alabama*, 287 U.S. 45, 67-69 (1932).

While the basic tenet of our law is by now well settled and universally accepted, a problem arises when counsel, who has been appointed by the Court, has been allowed little time to prepare his defense and familiarize himself with the law and

facts of the case. Does such a lack of adequate time for trial preparation raise an issue of constitutional proportions through denial to an accused of effective assistance of counsel? In 1932, the United States Supreme Court in *Powell v. Alabama, supra*, overturned the rape conviction of three (3) defendants whose counsel had not been appointed until the morning of trial. The Court broadly interpreted the meaning of the 5th and 6th Amendments' guarantees of the right to counsel:

> "The duty of the Court. . . to assign counsel as a necessary requisite of due process of law. . . is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case . . ." Page 71.

> "The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. It is vain to give the accused a day in Court with no opportunity to acquaint himself with the facts of the case." Page 59.

In *Avery v. Alabama, 308 U.S. 444 (1940)*, the Supreme Court, although holding that based on the facts in the record before it, showing appointment

of counsel only three (3) days before trial, defendant was not denied adequate assistance of counsel, stated by way of dictum that:

> ". . . while the disposition of a request for a continuance is made in the discretion of the trial judge . . . in the light of facts then presented and conditions then existing, . . . and is not ordinarily reviewed, the denial of opportunity for appointed counsel to . . . adequately prepare his defense could convert the appointment of counsel into a sham . . . . The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

In *White v. Ragen*, *324 U.S. 760, 764 (1945)*, the Supreme Court again held that "it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counse." The facts of this case, however, are not exactly analagous (court appointed counsel advised client to plead guilty, as the judge would not grant a continuance, and there was not time to call a crucial witness). In a case that seems at first to depart from the well established rule, *Chambers v. Maroney*, *399 U.S. 42 (1970)*, the Supreme Court found no prejudice to the defendant where the legal aid

attorney appointed very shortly before his second trial was not the same attorney as had handled his defense at the first trial: "Unquestionably, the courts should make every effort to affect early appointments of counsel in all cases. But we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel." Page 54. While the Maroney decision seems on first glance to have raised the standards by which a due process challenge to conviction in which counsel had inadequate time for preparation is to be measured, it is important to point out that it can readily be distinguished on the basis of its peculiar factual circumstances: the legal aid attorneys who represented the defendant in the two (2) trials were both on retainer from the same law office, and presumably had access to each other and to case files. The Supreme Court made specific mention of the fact that, after examining the record, it had found no evidence that the appearance of a different attorney at the second trial had resulted in any prejudice to the petitioner.

This distinction was not enough to satisfy Justice Harlan, however, whose dissent pointed to the fact that "it is not an answer to petitioner's claim for a reviewing court simply to conclude that he had failed to show that with adequate assistance he would have prevailed at trial," Page 60. In an opinion which cited *Powell v. Alabama, supra*, and *Avery v. Alabama, supra*, Justice Harlan argued that the petitioner shold have at least been entitled to an evidentiary hearing in District Court on the issue.

The decisions rendered by the Court of Appeals for the 2nd Circuit have for the most part been in line with the Supreme Court's declarations in the past. In *United States v. Denno, 239 F. Supp. 851 aff'd. 348 F. 2d 12 (2d Cir. 1965)*, the Court granted a petition of habeus corpus where the defendant had expressed an unwillingness to proceed with his assigned counsel who had been appointed ten (10) minutes before trial, but was willing rather to proceed as his own counsel:

> "An accused's constitutional right to defend in person or by counsel of his own choosing is denied unless accused gets . . .

> reasonable time and fair opportunity . . . to prepare for trial; no last minute peremptory assignment of counsel will serve, particularly when made at such a time and under such circumstances as practically to preclude the giving, by counsel to prisoner and prisoner to counsel, of effective aid in the preparation of the case." Page 854.

In *United States v. McMann*, 252 F. Supp. 539, *aff'd.* 386 F. 2d 611 (2d Cir. 1967), the Court similarly granted a petition of habeus corpus to a prisoner who had been forced to trial without retained counsel after having refused the offer of legal aid on provision that a one-hour (1) limitation for consultation was agreed to. The Court held that this was not an offer of effective assistance of counsel so as to warrant the finding of a waiver: "The defendant must have complete confidence in counsel, and hence, a change, if it occurs, or even a discharge, will usually point to a continuance." Page 545. The Court then went on to make the very important remark that "a determination of constitutional challenges to judgments of conviction must not be influenced by certitude of guilt, or by the fact that the defendant is a bad man with a long criminal record." Page 546. [Quoted from Justice Frankfurter in *Stein v. State*, 346

U.S. 156, 200].

In *United States v. Mitchell*, *354 F. 2d 767 (2d Cir. 1966)*, the Court of Appeals held that in a conviction for failure to report into the armed forces, where the trial judge granted the defendant only the period between Wednesday and the following Monday to obtain counsel, he had abused his discretion:

> "A reasonable time is required for counsel to familiarize himself with the various intricacies of the . . . law, and to decide upon the proper strategy to be followed at the trial in order, if possible, to obtain an acquittal, or to make a record for purposes of appeal, or to obtain as light a sentence as the circumstances might warrant . . . . The exercise of the right to counsel must be balanced with the necessities of sound judicial administration. A speedy trial, also guaranteed by the 6th amendment, is a desirable object of the criminal law... At the same time however, the desire for expedition can furnish no justification for the subversion of the 6th amendment right to present an effective defense through counsel." Page 769.

United States, ex rel. Bradley v. McMann, 423 F. 2d 656 (2d Cir. 1970), however, held

along a different line. In this case, a lack of consultation between attorney and defendant until the day before trial was held not prejudicial in view of the circumstances of the case: appellant's alleged alibi was not disclosed to counsel at a conference several hours before trial began, but was mentioned for the first time when appellant testified. The Court thus viewed the fact that the meeting with counsel did not take place earlier as not significant. This fact alone makes the McMann case distinguishable from those cases which have held such lack of time for consultation before trial as prejudicial *(supra)*.

United States v. Bentvena, *319 F. 2d 916 (2d Cir. 1963)*, however, presents a manifestly different situation. In Bentvena, thirteen (13) defendants were convicted in United States District Court for violation of, and conspiracy to violate Federal narcotics laws. At a pre-trial conference taking place three (3) days before the trial had been scheduled to begin, the trial court had relieved defendant Mancino's counsel of his assignment because of health and substituted another attorney, adjourning the trial for two (2) weeks to enable newly assigned

counsel to prepare. The trial judge received assurance that the new attorney could be adequately prepared by that time. On appeal, the defendant argued that a denial of a further continuance by the trial judge constituted an abuse of discretion, and denied him the effective assistance of counsel. The Court of Appeals rejected this argument, holding that the measures taken by the trial court to assure defendant effective representation were sufficient under the circumstances, and in view of the "difficulties experienced in bringing the case to trial a second time." Page 935.

It is respectfully urged that the trial court in the Bentvena case adopted the proper procedure (which this Court approved by its affirmance) to be followed under circumstances which require appointment of new counsel on the eve of, as well as during, trial.

Another appeal was prosecuted in the Bentvena case on behalf of three (3) defendants, who, on the first day of trial, found themselves without counsel. The attorney for the two (2) Panicos defendants had informed the court at the pre-trial

conference three (3) days before trial that he had been ordered to trial in a State Court proceeding; he subsequently was absent from the Courtroom for the first nine (9) days of trial. In addition, defendant Laicanos' attorney fell ill and had been sent to the hospital on the morning of trial; he was absent from the Courtroom for the first fourteen (14) days of trial. In response to these developments, the trial judge assigned another attorney to represent the three (3) defendants in the interim, and directed the prosecution not to put in evidence anything directly relating to these defendants until their retained counsel returned. This was complied with. It is important to note, however, several distinguishing factors between these circumstances, and the present appeal. In Bentvena the newly appointed counsel, one George Todaro, was well acquainted with the case. He had originally been assigned to defend another of these defendants, and as such, had the benefit of several months of trial preparation. Furthermore, both departed attorneys later returned to the case, at which time the trial judge afforded them an opportunity to review the existing trial record, make

any motions, or recall any witnesses for further cross-examination. They were also afforded an opportunity to make an opening address after the government rested. The Court of Appeals rejected appellants' claim that they were denied effective assistance of counsel, finding that the steps taken by the Court during retained counsels' absence, and the opportunities made available to them on their return fully protected the defendants' rights. Page 937.

The Trial Court's actions in the instant case fall far short of the measures taken by the trial judge in Bentvena, and, accordingly, the treatment accorded defendant Henry Salley did not live up to what is constitutionally required.

Some contrary authority would appear to exist in this circuit which would require a considerably stricter standard to measure whether the treatment accorded to a criminal defendant is consistent with due process of law. The leading such case is *United States v. Wight*, 176 F. 2d 376, (2d Cir. 1949), cert. den. 338 U.S. 950 (1950). In Wight the Court held that the fact that the defendant conferred with

counsel assigned by the Court for about fifteen (15) minutes between counsel's assignment and the entrance of a guilty plea did not establish a denial of the constitutional guarantee of conscientious service of competent counsel, where the belief of counsel that the defendants' acts were within the prohibition of the statute under which the indictment was laid was correct. The Court found that notwithstanding the relatively short amount of time spent by counsel with the defendant, and the absence of any research on the syntax of the statute, counsel, led by his own experience and judgment, had arrived at the correct answer. No longer period of consultation could have changed his determination.

It is, however, obvious that the Wight case, which did not involve a trial, is not in point herein. There are some 2nd Circuit cases which have followed the strict standard set forth in Wight: *United States v. Garguilo*, 324 F. 3d 795 (1963); *United States, ex rel. Maselli v. Reincke*, 383 F. 2d 129 (1967); *United States v. Currier*, 405 F. 2d 1039 (1969); *United States v. Silva*, 418 F. 2d 328 (1969); *United States, ex rel. Scott v. Mancusi*, 429 F. 2d 104 (1970);

United States, ex rel. Crispin v. Mancusi, 448 F. 2d 233 (1971); *United States, ex rel. Marcelin v. Mancusi*, 462 F. 2d 36 (1972). These cases include proceedings in which there is a "total failure to present the cause of the accused in any fundamental respect," and proceedings in which counsel's representation was "so horribly inept as to amount to a breach of legal duty faithfully to represent the clients' interests" *United States, ex rel. Marcelin v. Mancusi, supra*.

The foregoing cases which have applied these harsh standards, with the exception of the distinguishable case of *United States v. Wight, supra*, all concern situations where the competency of counsel has been attacked, based upon what would amount to a denial of assistance of counsel, rather than such a denial resulting from a lack of time for preparation. Thus, it is urged that these "independently stringent requirements established by the second circuit as to claims of alleged inadequacy of counsel," *Wirth v. United States*, 348 F. Supp. 1137, 1140 (1972), are not in point, and concern manifestly different and distinguishable factual situations from the current case.

There has been no decision in the 2nd Circuit deciding the question of who has the burden of proof with regard to the existence of prejudice to the defendant. The issue was first argued in *United States, ex rel. Bradley v. McMann, supra*, where the defendant, citing a series of 4th Circuit cases (infra), argues that the burden of proof to rebut the presumption of prejudice to an accused once scanty preparation by counsel is shown is on the State. The Court refused to decide this issue, having decided the case on the basis of the trial record before it. However, the 4th Circuit cases which defendant relied upon in his brief merit some investigation. In *Fields v. Peyton, 375 F. 2d 624 (4th Cir. 1967)*, the Court held that a defendant convicted of escape and burglary fifteen (15) to thirty (30) minutes after appointment of counsel was denied effective assistance of counsel, and required invalidation of sentence. In so holding the Court stated:

> "The Federal rule is that when inadequate time for preparation has been shown, the burden shifts to the State to negate prejudice. . . . Affirmative evidence is necessary to overcome the

> presumption of prejudice from the shortness of time allowed for preparation. . . . Doubtless in the past there have been numerous instances of the designation of counsel on the day of the trial, and even in the last hour before trial. This procedure is no longer considered satisfactory, for it invites lax performance of professional duty and endangers defendant's constitutional right to the effective assistance of counsel. As the concept of the 6th amendment right has broadened to encompass the provision of counsel for indigents, *Gideon v. Wainwright, 372 U.S. 335,* so too the standards to which appointing and appointed counsel must adhere have become more exacting. Courts are required to allow counsel sufficient time to inform themselves fully, to reflect maturely, and to prepare thoroughly in the cases to which they are assigned." Pages 626-628.

Martin v. Virginia, 365 F. 2d 549 (4th Cir. 1966) makes the same point. Here the Court held that 3 1/2 hours between indictment and trial was insufficient time for appointed defense counsel to investigate a case in which a number of nonfrivolous questions merited thoughtful consideration. In so holding, the Court stated:

> "The Appellate Courts have insisted that ample time be allowed counsel for preparation... A showing of

> actual prejudice is not the basis on which these cases rest. The lack of opportunity for investigation, reflection, conference, and mature consideration which results from trials of felonies immediately after appointment of counsel provides the basis for granting the writ. . . . The burden isn't on the petitioner to show that he would profit by a trial in which counsel had more time for preparation. Lack of due process is implicit when a felon is tried immediately after the appointment of counsel." Page 552.

The Court in *Martin v. Virginia*, even obviated the necessity of a hearing on the issue of prejudice, arguing that the inherent danger of prejudice to the accused under such circumstances "makes additional inquiry futile and unnecessary" *(supra, page 552)*. Finally, in *Twiford v. Peyton*, *372 F. 2d 670 (4th Cir. 1967)*, the Court held specifically that a failure to appoint the attorney until the day before trial, coupled with a denial of a continuance on the date of trial did not meet the standards of fundamental fairness required by the 5th and 6th amendments:

> "The practice of appointing counsel in a felony case so close to trial that the lawyer is not afforded a reasonable opportunity to investigate and prepare a case is inherently

> prejudicial, and a mere showing. . . constitutes a prima facie case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the State." Page 673.

On the issue of prejudice, the Supreme Court has not specifically ruled. However, it has stated in another context, and with regard to an unrelated allegation of a deprivation of defendant's rights that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Page 542-543.

An investigation of the Appellate decisions of circuits other than the 2nd and 4th circuits reveals a concurrence of opinion on this issue. In the 5th Circuit, *Everitt v. United States, 281 F. 2d 429 (1960)*, held that the trial court committed a fundamental error in depriving accused of assistance of counsel, within the meaning of the constitutional provision, in denying him additional

time to prepare for trial when he was without counsel, and in putting him to trial when his appointed counsel had less than one (1) day to prepare for trial, in a case complicated by the fact that there were three (3) separate indictments involving other defendants as well who were not on trial, and where defendant was compelled to be jointly tried with co-defendants charged in several indictments when he was charged in only one. This case involved a confusing series of occurrences due to the many indictments and defendants involved, the haste with which it was tried, and the shortage of time in which counsel could adequately prepare defense. While it does not involve an indictment for conspiracy, the circumstances surrounding trial are analagous to the present case.

In *McBee v. Bomar*, 296 F. 2d 235 (6th Cir. 1961), the Court of Appeals for the 6th Circuit found an abuse of discretion where the Trial Court failed to grant a motion for continuance to enable counsel to acquaint himself with the facts of the case, where he had been summoned only one (1) day prior to trial due to defendant's error in reading

the date of his trial. In so holding the Court discussed the meaning of "abuse of discretion": "A motion for continuance is subject to the discretion of the trial judge and can only be set aside by the reviewing court when there is an abuse of discretion. Abuse of discretion is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary manner, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment." Page 236.

Finally, in a decision by the Court of Appeals for the 9th Circuit, *Brubaker v. Dickson, 310 F. 2d 30 (9th Cir. 1962), cert. den. 372 U.S. 978 (1963)*, the Court held that defendant was entitled to an evidentiary hearing on the issue of whether effective assistance of counsel had been rendered. The Court stated that "determining whether the demands of due process were met . . . requires a decision as to whether upon the whole course of the proceedings, and in all the attendant circumstances, there was a denial of fundamental fairness." Page 37.

Based upon the foregoing, it would

seem to be clear that the Trial Court's failure to grant a continuance for the purpose of allowing counsel to familiarize himself with a case as complicated as the instant case constituted a clear abuse of discretion warranting a new trial for defendant Salley.

Although the cases apparently do not require a showing of actual prejudice in the light of the strong presumption of prejudice resulting from lack of time for new counsel to prepare for trial, the record in this case discloses some actual prejudice as well. The original counsel for defendant Salley had made an opening statement in which he indicated that Salley would testify. In a post-trial motion, the substituted counsel stated that, as a result of this committment made in the opening, he felt it necessary to have Salley take the stand. The record discloses, furthermore, that the cross-examination of Salley allowed the prosecution to bring out a prior narcotics conviction of Salley and also to introduce into evidence, on their rebuttal case, a hotel registration card that was not offered on the Government's original case.

Accordingly, it is respectfully

urged that there was actual prejudice demonstrated which would constitute an additional reason for reversal and the granting of a new trial.

POINT II

THE EVIDENCE AGAINST DEFENDANT SALLEY, AT BEST, WAS PROOF OF A SINGLE ACT WHICH WAS NOT SUFFICIENT TO PLACE HIM WITHIN THE AMBIT OF THE ALLEGED CONSPIRACY.

The sole evidence against defendant Salley on the Government's direct case consisted of one (1) witness (Pannirello) who said that he was a participant in a conversation in furtherance of the conspiracy at which Salley was present and one other witness (Provitera) who, in part contradicting Pannirello, said that Salley was present in New Jersey on three (3) occasions, that on two of those occasions Salley was merely a spectator and in no way participated in transactions between others and on the third occasion he accepted delivery from Provitera of a package allegedly containing narcotics.

It is respectfully urged that, even accepting the Provitera version of the facts, the

evidence against Salley indicates that he was involved in a single act consisting of acceptance of delivery of narcotics on one (1) occasion from a member of the alleged conspiracy. There is ample authority that such a single act is not sufficient proof to establish that Salley was a member of the conspiracy.

The Supreme Court has held that conspiracy to commit a particular substantive offense cannot exist without at least a degree of the criminal intent necessary for the substantive offense itself and that, without knowledge, such intent cannot exist. Further, to establish the necessary intent, the evidence of knowledge on the part of the defendant must be clear and not equivocal. *Ingram v. United States*, 360 U.S. 672 (1959).

For many years it has been the rule in the Second Circuit that a person who makes a single purchase of narcotics from a member of a conspiracy does not thereby become himself a member of the conspiracy. In *United States v. Koch*, 113 F. 2d 982 (2d Cir. 1940), it was held that the Government must

show that the defendant is in some way knowingly associated in an unlawful common enterprise and that the mere purchase of a large amount of narcotics was insufficient to establish that the defendant was a member of the conspiracy. The Koch case placed upon the Government the burden of showing that the defendant was acting to further the ends of the conspiracy rather than merely furthering some independent narcotics enterprise of his own.

United States v. Peoni, 100 F. 2d 403 (2d Cir. 1938) held that a defendant who sold counterfeit currency to a second party was not a co-conspirator in the conspiracy between that party and others since he had not knowingly joined the endeavor by the second party to resell the counterfeit currency. Drawing the analogy of the Peoni case to the instant case, it is, of course, obvious that Salley, having had no knowledge of the conspiracy whereby Pannirello and Provitera came into possession of the narcotics, could not have joined the conspiracy charged in the Indictment since he had absolutely no knowledge thereof.

United States v. Reina, 242 F. 2d 302 (2d Cir. 1957) is a case in which this Court has drawn the distinction between a purchaser of narcotics who

does not thereby join the conspiracy and a purchaser of narcotics who does join the conspiracy by his act. The Court held that where evidence was equally consistent with defendant being an independent peddler of narcotics, a single sale of a parcel of narcotics did not prove that defendant was a participant in the series of importations that made up the conspiracy charged. A co-defendant who had knowledge of where the drugs were coming from was, however, found to have joined the conspiracy on the basis of his single purchase since knowledge of the conspiracy could be inferred from the knowledge that this defendant was shown to possess.

While there are a number of cases in this Circuit holding that a single act of purchasing narcotics may be the foundation for drawing the actor within the ambit of an existing conspiracy, these cases are grounded upon independent evidence proving that the defendant had some knowledge of the broader conspiracy. *United States v. Agueci*, 310 F. 2d

817 (2d Cir. 1962), Cert. den. 372 U.S. 959 (1963).

This Court cited the Agueci case in United States v. Bentvena, supra, in holding that the independent evidence showing that the defendant had participated in a conference at which the opening of a new wholesale outlet was discussed was sufficient to sustain the conviction of the defendant even though he had only engaged in a single act.

United States v. DeNoia, 451 F. 2d 979 (2d Cir. 1971) and United States v. Kane, 351 F. 2d 600 (2d Cir. 1965) are other cases in which the Court found the independent evidence sufficient to warrant an inference that the defendant knew of the conspiracy so as to enable conviction upon proof of a single act.

Absent independent evidence in proving knowledge of the conspiracy, this Court has repeatedly held that a defendant who made one (1) purchase of drugs from one (1) member of an existing conspiracy had not knowingly joined the conspiracy. United States v. Aviles, 274 F. 2d 179 (2d Cir. 1960); United States v. Santore,

290 F. 2d 51 (2d Cir. 1960); United States v. Stromberg, 268 F. 2d 256 (2d Cir. 1959).

United States v. Gallishaw, 428 F. 2d 760 (2d Cir. 1970) held that it is necessary that there be proof that a defendant have specific knowledge of the object of the conspiracy in order to sustain a conviction.

United States v. Thomas, 468 F. 2d 422 (10th Cir.1972) was a case in which the defendant, a sister of the head of a large scale narcotics operation, was found not to have joined the conspiracy despite evidence showing that she knew of her brother's operation and on one (1) occasion introduced persons to a co-conspirator with the result that these persons then made a purchase of narcotics. The Court held:

> "Since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent". Page 425

> "There must be evidence showing that an accused knowingly acted to further the enterprise. Guilt may not be inferred from mere association. Mere knowledge, approval or acquiescence in the

object or purpose of a conspiracy does not make one a conspirator." Page 425

Taken in the light most favorable to the Government, the evidence against Salley would show that he participated, at most, in a single act of accepting delivery (this itself falling short of a purchase) and that there were absolutely no independent evidence showing that Salley had any inkling of the widespread conspiracy in which Pannirello and Provitera had engaged. Thus, under the single act doctrine, there was insufficient proof to sustain the conviction of Salley or even to allow the case to go to the jury.

P O I N T III

THE IN COURT IDENTIFICATION OF SALLEY BY PROVITERA SHOULD HAVE BEEN SUPPRESSED IN THE LIGHT OF THE SUGGESTIVE PHOTOGRAPHIC SPREAD SHOWN TO THIS WITNESS PRIOR TO TRIAL.

At trial one of the two witnesses who allegedly had dealt with Salley (Pannirello) was unable to identify him while the other

(Provitera) did identify Salley. Prior to his identification of Salley, Provitera had misidentified one of the other three (3) black male defendants in the Courtroom and thereby learned the identity of two (2) of the four (4) black male defendants. Thus, when it came time to identify Salley, Provitera had only two (2) persons to choose from.

Although the Court had denied Salley's application for a lineup, a hearing was held with respect to the out of Court identification of a photograph of Salley. This hearing disclosed a contradiction between Provitera and the Agent who showed Provitera the photographs as to the number of photographs shown. Even if the Agent was correct, however, and nineteen (19) photographs were actually shown to Provitera, the photographic spread was undoubtedly suggestive. One one (1) of the nineteen (19) photographs was other than a mug shot and this photograph was more than twice the size of the other photographs according to the Agent (defense counsel characterised the photograph of Salley as being closer to four times

the size of the others).

Based upon the evidence adduced at the hearing, there is no doubt that the photographic spread was unfair and that it thereby violated the Supreme Court's guidelines set forth in *United States v. Wade*, 388 U.S. 218 (1967).

Simmons v. United States, 390 U.S. 377 (1968) dealt with the problem raised in cases in which in Court identification is preceded by a suggestive and improper photographic spread. The Supreme Court held:

> "[E]ach case must be considered on its own facts, and. . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
>
> The danger on which the Court was focusing, of course, was that '[r]egardless of how [an] initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or Courtroom identification.' Id., at 383-384."

In the instant case, the in Court identification by Provitera was tainted not only by the improper and suggestive photographic spread, but was also affected by the witness (as a result of a prior mistaken in Court identification) having been able to limit his choice to one of two individuals.

It is respectfully urged that the in Court identification by Provitera should have been suppressed and, if it had been suppressed, there would have been no identification of Salley whatsoever. Accordingly, it is urged that, on this issue alone, it would have been necessary to dismiss the Indictment as against Salley at the conclusions of the Government's case.

POINT IV

DEFENDANT-APPELLANT SALLEY JOINS IN AND ADOPTS THE ARGUMENTS ADVANCED BY ALL OTHER APPELLANTS ON ALL ISSUES RAISED IN THE BRIEFS OF SUCH APPELLANTS.

CONCLUSION

The Judgment of Conviction should be reversed and the Indictment dismissed as against

defendant-appellant Salley.

Dated: New York, New York
August 9, 1974

Respectfully submitted,

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Appellant Salley